IN THE UNITED STATES OF BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
Mirant Corporation, et al.,	§	
	§	Case No. 03-46590
	§	Jointly Administered
Debtors.	§	Chapter 11
	§	

MIRANT AMERICAS ENERGY MARKETING, L.P.	§	
	§	
Plaintiff	§	
	§	
vs.	§	Adversary No. 03-4359
	§	
METROMEDIA ENERGY, INC., Defendant.	§	

MEMORANDUM ORDER

Before the court is a motion filed by Mirant Americas Energy Marketing, L.P. ("MAEM" or "Plaintiff") in the above-styled adversary proceeding seeking relief from arbitration and forum selection clauses contained in certain agreements between MAEM and Metromedia Energy, Inc. ("MEI" or "Defendant") (the "Motion"). Plaintiff has filed a memorandum of authorities in support of the Motion and Defendant has filed a response. The parties argued orally to the court on November 12, 2003. The court here exercises jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and (b) and 157(b)(3).

The issue before the court is whether, under the Federal Arbitration Act (9 U.S.C. §1, *et seq.*, hereafter the FAA), this court should defer to arbitration proceedings in connection with resolution of this adversary proceeding. Though the Motion also asks that the court override

forum selection provisions in the agreements between MAEM and MEI, MEI has not yet addressed this question.

The general rule is that is that a federal court must defer to contractually mandated arbitration unless the party opposing arbitration can show that its position is supported by a congressional command that supercedes the direction of the FAA. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (19989); *Insurance Company of North America v. NGC Settlement Trust,* 118 F.3d 1056, 1065 (5th Cir. 1997). In a bankruptcy case, as conceded by Plaintiff, the party opposing arbitration must address two points: whether the matter subject to arbitration falls within the bankruptcy court's core jurisdiction and whether enforcement of an arbitration provision would conflict with the purposes of the Bankruptcy Code. *Gandy v. Gandy*, 299 F. 3d 489, 495 (5th Cir. 2002); *NGC*, 118 F. 3d at 1069-70.

In the case at bar, Plaintiff argues that this test has been met. MAEM sold gas to MEI. Under the agreements between the parties, MEI's receivables generated from resale of the gas were assigned to MAEM and were supposed to be paid into a lockbox. MAEM terminated the agreements with MEI in July of 2003 and now demands in the adversary proceeding that MEI "turn over", pursuant to section 542 of the Bankruptcy Code, approximately $33,000,000 it claims it is due. However, the $33,000,000 is not in the lockbox, nor has MAEM identified outstanding receivables to which it is entitled.

Section 542 of the Bankruptcy Code typically applies where there is identifiable property, such as an escrow fund, that can be turned over to the estate. *See* NORTON BANKRUPTCY LAW & PRACTICE 2d § 5.24 (1994). Section 542 is not intended to create a core bankruptcy right for establishing the disputed liability of a third party to a debtor. *U.S. v.*

Inslaw, Inc., 932 F.2d 1467, 1472 (D.C.Cir. 1991); *In re Seatrain Lines, Inc.*, 198 B.R. 45, 50 (S.D.N.Y. 1996). In the instant case, MAEM argues it is entitled to a specified amount (an amount disputed by MEI), not to identifiable property or payment of a debt which is not disputed. While Plaintiff complains of conversion of its property by Defendant, the court is pointed to no specific account receivable or fund held or converted by Defendant. The court, therefore, assumes that any monies MAEM may have been entitled to have been commingled with MEI's other cash and are not now identifiable. Whether MEI had a right to act as it did or not, section 542 is not MAEM's remedy in this situation. Section 542(b); *In re Satelco, Inc.*, 58 B.R. 781, 784-5 (Bankr. N.D. Tex. 1986).

In fact, Plaintiff's suit is no more than an ordinary collection action. Section 542 is appropriate where the property held by a third party is admitted to be subject to an ownership interest in the debtor but may also be subject to a claim of the third party. Here, Plaintiff attempts to use section 542 as a tool to bring before this court a matter which could and would be fully litigated in state courts or resolved through arbitration. MAEM's chapter 11 filing and the consequent availability of section 542 does not alter the nature of Plaintiff's claims or imbue them with a federal character.

Plaintiff has thus failed to show that a core matter is implicated by the adversary proceeding. Plaintiff's argument that arbitration of its dispute with Defendant would interfere with these reorganization cases is also deficient. Plaintiff essentially argues that arbitration will involve delays to the prejudice of creditors. However, the court questions whether, even if arbitration proves time-consuming, the amount in dispute will impair or impede the reorganization process of a family of debtors with assets and debts in excess of $10,000,000,000.

Moreover, even assuming this court could more efficiently dispose of the adversary proceeding, as Plaintiff suggests, that is not a valid basis to override an arbitration clause in an agreement. *See NGC*, 118 F. 3d at 1069, citing *Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927 (1983) and *Tai Ping Ins. Co., Ltd. v. M/V Warschaw*, 731 F.2d 1141 (5th Cir. 1984).

For the foregoing reasons, the court concludes it should not prevent arbitration proceedings and, to the extent Plaintiff seeks relief from arbitration, the Motion must be DENIED. The court does not understand that it must address the parties' forum selection contractual provisions at this time. Accordingly, the court's ruling is without prejudice to reassertion of the Motion at such time as the forum selection provisions of the parties' agreements become an issue.

It is so ORDERED.

Signed this the 17th day of November 2003.

HONORABLE DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE